

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Timothy Allegri, Complainant)
)
 Complainant,)
 v.)
)
 Evergy Metro, Inc. d/b/a Evergy Missouri Metro)
 And Evergy Missouri West, Inc. d/b/a)
 Evergy Missouri West,)
)
 Respondents)

File No. EC-2024-0015

STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its *Recommendation* in this matter states:

1. Timothy Allegri filed his original *Complaint* against Evergy Missouri West and Evergy Missouri Metro (Evergy or Company), requesting to add an additional 26 complainants on July 25, 2023. The Commission ruled that complaint deficient because a pro se complainant is not authorized to represent other pro se complainants. On September 11th, 12th, 18th and 28th an additional 37 complainants filed individual complaints against Evergy Missouri West with substantially similar fact patterns to this matter. The Commission issued an order consolidating these complaints and directed Staff to file its *Recommendation* for these complaints no later than November 6, 2023. Staff's *Recommendation* is attached to this pleading.

2. The additional complaints addressed by this *Recommendation* are docket nos. EC-2024-0062; EC-2024-0063; EC-2024-0064; EC-2024-0065; EC-2024-0066; EC-2024-0067; EC-2024-0068; EC-2024-0069; EC-2024-0070; EC-2024-0071; EC-2024-0072; EC-2024-0073; EC-2024-0074; EC-2024-0075; EC-2024-0076;

EC-2024-0077; EC-2024-0078; EC-2024-0079; EC-2024-0080; EC-2024-0081;
EC-2024-0082; EC-2024-0083; EC-2024-0084; EC-2024-0085; EC-2024-0086;
EC-2024-0087; EC-2024-0088; EC-2024-0089; EC-2024-0090; EC-2024-0091;
EC-2024-0093; EC-2024-0094; EC-2024-0095; EC-2024-0096; EC-2024-0097;
EC-2024-0114 and EC-2024-0115. Staff does not reference the individual complainants in this *Report* but acknowledges that all of the complainants appear to be affected by the proposed construction project/movement of the electric line.

3. Staff outlines the facts it gathered through its investigation in detail in its *Recommendation*. In summary, Evergy Missouri West proposes to extend its existing easement for an electric line along an 8.7-mile stretch of Highway 13 in Johnson and Lafayette counties in western Missouri. The Company has sought to obtain the land required for this construction, a permanent easement outside of the highway right of way, through eminent domain proceedings filed in Johnson (Case No. 23JO-CC00142) and Lafayette counties (Case No. 23LF-CV00700 refiled under Case No. 23LF-CV00939). The Missouri Department of Transportation (MoDOT) is performing improvements to a section of Highway 13, and Evergy's electric line is presently located along that highway in the highway right of way. As MoDOT stated in an October 2020 email, the majority of the road improvements are occurring on the east side of the highway opposite from Evergy's line. In a March 7, 2023, email MoDOT specifically states that it is adding some passing lanes and cutting vertical curves, but the only other work is resurfacing of the road.

4. Evergy proposes improvements/relocation to an 8.7-mile section of the highway; although in response to Staff's data request (DR) 12.2, Evergy provides a

document reporting an impact to only 23 of Evergy's transmission structures. Additionally, in an October 2020 email, Evergy reaches out to MoDOT stating that it wishes to rebuild the transmission line and inquires about MoDOT's road-widening plans. In fact, at page 10 lines 6-14, of the transcript from the initial eminent domain hearing in Lafayette County, Evergy's attorney stated to the judge that the changes to Evergy's line were not due to MoDOT's construction, but were related only to relocating the line. However, Evergy's petition to the circuit court stated that the MoDOT construction was the purpose. Evergy states a desire to change its line from wooden poles to steel poles in the correspondence documents provided in response to Staff's DR 9.1. In that same response, Evergy tells Mr. Allegri that the Company has instituted a new policy of constructing lines outside of highway right of ways in relation to safety concerns for drivers on the highway. In response to DR 3 Evergy states that the movement policy is for the safety of Evergy workers and the public. According to Evergy's response to Staff's DR 13, an employee of a contracted company was injured on or near Highway 13 while doing work but the injury occurred when the employee jumped from a moving truck to place signage and struck his head on the pavement. However, this injury would not appear to be related to the location of the line or the right of way. As evidenced, Staff's investigation has revealed quite a bit of contradictory and confusing data, which would hopefully be straightened out at a hearing.

5. Complainant Allegri appears to have concern that Evergy claims a potential for a change in voltage of the line at some point in the future in his filing titled *Re: Formal Complaint filed July 25, 2023 by Timothy Allegri*. Staff's report explains how

additional considerations would need to be made before the voltage of the line could change. Finally, when Staff requested a copy of the final plans for the Fayetteville Transmission Project in its DR 14, Evergy responded that the final plan was not complete, and it may not be final before April 2024. Staff has outstanding DRs due throughout the month of November which may lend additional information to this investigation.

6. Staff's position is that Evergy has exceeded the parameters of its authority granted in its certificate of convenience and necessity (CCN) granted to the Missouri Public Service Corporation in Case No. 9470 for the counties central to these complaint filings. Staff recommends that the Commission order a hearing in this matter and grant the complainants the opportunity to put on witnesses and gather evidence to best determine the nature of the project by Evergy that sits at the center of these complaint filings, and whether the Company has violated a statute, Commission rule, tariff or Commission order. Staff would provide the additional information gleaned from its outstanding DRs in testimony or at hearing depending on the nature of the procedural schedule ordered in this matter. Staff would also suggest that the Commission order Evergy to provide monthly update reports to Staff regarding the status of Evergy West's Route 13 project in order to permit Staff to better determine the nature of this project and its effect on future rate cases.

7. Section 393.170, RSMo, instills the Commission with authority to grant a certificate of convenience and necessity to an electric utility for construction of utility plant and generation. Commission Rule 20 CSR 4240-20.045 (2)(A)2 requires an electric utility to get a CCN for construction of an asset pursuant to 393.170.1,

where construction is defined as a new asset or an improvement, retrofit, or rebuild of an asset that will result in a ten percent increase in rate base as established in the electric utility's most recent rate case Commission orders have been found to carry weight by their mere issuance, including a presumption that an order is lawful if it is issued under statutory authority. *State et rel. Assoc. Nat. Gas Co. v. Pub. Serv. Comm'n*, 706 S.W.2d 870,874 (Mo. App. W.D. 1985). The Courts have also stated that they are bound by the findings of the Commission if substantial evidence supports either of two conflicting factual conclusions. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732,734 (Mo.banc 2003). A Commission order for a CCN, therefore, carries a presumption of lawfulness by its mere issuance pursuant to the Commission's statutory authority.

8. As Evergy points out in its *Answer, Affirmative Defenses, and Motion to Dismiss* filed August 30, 2023; Section 523.010, RSMo, governs the condemnation of land for public utility purposes including electric lines and instills in the circuit courts the power to grant such condemnation requests when the provisions of this section are met. Evergy went on to say that determination of "need" is vested in the utility and that the responsibility falls upon a protesting landowner to allege and prove that the utility's claims of necessity constitute "fraud, bad faith, or an arbitrary or unwarranted abuse of discretion." *Missouri Public Service Co v. H&W Inv. Co., Inc.*, 602 S.W.2d 41,43 (Mo.App.1980). Staff does not assert that the Commission has authority to intervene in condemnation proceedings, but it does counter Evergy's assertion that the Commission has no jurisdiction in regards to this overall matter.

9. In 1938, in Case No. 9470, the Commission issued an order granting a certificate of convenience and necessity to Missouri Public Service Corporation, which is now held by Evergy Missouri West as authorization to provide electric services in the geographical areas relevant to these complaints. In a recent 2021 decision, the Court of Appeals for the Western District cited an opinion from 1913, just 25 years prior to the issuance of the CCN on which this project is based. “The basic statutory structure for CCNs has existed without significant change for more than 100 years. The electricity industry, on the other hand, has undergone revolutionary changes and has dramatically expanded in scope and operation since the PSC's inception. Without significant changes in its enabling statutes, the PSC, nonetheless, has maintained its regulatory authority over the industry. The reason for this expansion of authority is the PSC's singular, continual mission to regulate the natural monopoly of a public utility.” Matter of Amend. of Commission's Rule Regarding Applications for Certificates of Convenience & Necessity, 618 S.W.3d 520, 525 (Mo. 2021), reh'g denied (Apr. 6, 2021) *citing* State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co., 254 Mo. 515, 163 S.W. 854 (1913).

10. In the CCN issued in Case no. 9470, the Commission outlines five ordered paragraphs of guidelines related to the issuance of the CCN. In ordered paragraph one the Commission grants authority for the Missouri Public Service Corporation to provide electric service in several counties, including Johnson and Lafayette. This grant includes authority to construct electric transmission and distribution lines “over, along and across the highways” of said counties. The paragraph goes on to permit

construction along “private rights-of-way as may be secured by applicant.” A private right of way is also known as an easement.

11. Mr. Allegri, in support of his complaint, expressed that there has always been a “gentleman’s agreement” between Evergy and the landowners affected by this construction that the utility could access its line as needed for maintenance. Mr. Allegri also states in paragraph three of his *Response to Evergy Missouri West* filed on October 16, 2023, that the landowners proposed to memorialize this easement with Evergy instead of the utility acquiring ownership of the property, but that Evergy never responded to the offer. As stated previously, Evergy in its response to Staff DRs 3 and 9.1 reports a change in policy to moving its electric line locations outside of the public right of way established for highways to private right of ways that Staff imagines will also be acquired through eminent domain.

12. In ordered paragraph two the Commission states that “the Commission shall retain jurisdiction of the parties and the subject matter of that proceeding on the evidence now before the Commission, for the purpose of making such further order or orders as may be necessary.” This statement is made in regards to ensuring safe and adequate service and that all construction is consistent with the National Electrical Safety Code (NESC). Staff argues that the Commission retains jurisdiction at least to the extent of ensuring that the NESC is followed in conjunction with this project. As stated in Staff’s memorandum, the Company has reported to Staff that it does not have final plans for the construction project, but intends to complete the design to the 2017 NESC despite the 2023 NESC being adopted by this Commission effective

November 30, 2023. Staff requests that Evergy continue to update Staff on this project so that it may ensure that the final project is NESC compliant.

13. Ordered paragraph three involves the crossing of lines of another utility and is not relevant to this complaint and five is simply housekeeping for the implementation of the order. However, ordered paragraph four provides for notice to be provided to any utility, association or person affected by the construction or change to the phase, voltage or location of an electric line of at least 15 days. The provision also requires sufficient detail to be provided in that notice to permit the recipient to understand the actions the utility will take in regards to that construction or change. Again Staff reports that Evergy has stated the final plans for the project are not complete, therefore, Staff cannot assume that the sufficient detail anticipated in the provisions of CCN has been met. Staff inquired of the Company what type of notice was provided to the complainants. In response to Staff's data request (DR) 9.1, Evergy provided conversations between itself and Mr. Allegri, including emails between the Company and the Complainant acknowledging that a formal letter from Evergy had not yet been sent as these discussions regarding the movement of the line were taking place. It appears Evergy originally sent notice that they were investigating rebuilding the line on April 29, 2022, then sent a letter on February 23, 2023, notifying the potential of line movement related to Missouri Department of Transportation construction, and finally a formal letter stating the effect on Allegri's property and the offer of compensation was sent on May 18, 2023. The May 18 letter included a 30-day response time granted to the Complainants to accept Evergy's acquisition offer, June 17, 2023. Mr. Allegri and the other complainants filed this complaint with the

Commission on July 25, 2023, and Evergy filed eminent domain petitions in the circuit courts of Johnson and Lafayette counties on July 27, 2023; 40 days after the deadline for the Complainants to accept offer of the land acquisition. The letter itself references that “we must obtain land” related to the movement of the line but then calls the transaction an “easement”. Staff is concerned that the confusion expressed in just the notice of this event is justification for an evidentiary hearing in which these questions could be answered more succinctly.

14. Staff contends that Evergy has exceeded the bounds of its CCN based on the authority granted in ordered paragraph one of the CCN order extending to construction in the right of way. Evergy has sought to relocate an electric line outside of the highway right of way and even states that this is a new policy of the company in its response to Staff DR 3, citing safety concerns. Staff argues that this policy of the Company to encroach on private land outside of the existing highway right of ways is sufficient to warrant it seeking Commission approval prior to the policy change and prior to seeking eminent domain. Staff also argues that giving notice to the Commission of the project would have alleviated some concerns and at the least Evergy should have ensured that proper notice of the exact plans was provided to landowners given the ordered paragraphs in the order granting a CCN in Case No. 9470.

15. In a recent Report and Order from the Commission related to Case No. EA-2023-0017, regarding Grain Belt, the Commission pointed out that Grain Belt had “developed the Missouri Landowner Protocol as part of its approach to right-of-way acquisition for the transmission line project. The Landowner Protocol is a comprehensive policy of how Grain Belt interacts, communicates, and negotiates with

affected landowners and includes: the establishment of a code of conduct, its approach to landowner and easement agreement negotiations, a compensation package, updating of land values with regional market studies, tracking of obligations to landowners, the availability of arbitration to landowners, the Missouri Agricultural Impact Mitigation Protocol, tracking of obligations to landowners, the availability of arbitration to landowners, and a decommissioning fund.” While Staff acknowledges that the Commission does not have authority to order exactly such a policy or protocol as the Grain Belt protocol, Staff has asked for conditions to be ordered related to a CCN case. Staff would suggest that of its own volition, every Missouri regulated utility could benefit from a similar policy or other directives in the course of its dealings with Missouri landowners.

WHEREFORE, Staff prays that the Commission will accept this *Staff Report*; will grant the complainants an evidentiary hearing to put evidence into the record and present witnesses regarding the allegations in their complaints and permit Staff to further present evidence of the concerns raised in this *Report*; will order Evergy to provide monthly reports to Staff regarding the Highway 13 electric line project until the final plans can be provided to Staff and submit those plans to Staff once complete; and will grant such other and further relief as is just in the circumstances.

Respectfully submitted,

/s/ Whitney Scurlock

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 6th day of November, 2023, to all counsel of record.

/s/ Whitney Scurlock